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No. 471

In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 471

MILDRED W. SMITH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 13a–23a [1]) is not officially reported. The opinion of the court of appeals (Pet. 14–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1962 (Pet. 23). A timely petition for rehearing was denied on August 15, 1962 (Pet. 24). The petition for a writ of certiorari was filed on September 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the appendix to the taxpayer's brief in the court of appeals.

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QUESTION PRESENTED

Upon the death of an officer of a corporation, the board of directors authorized the payment, out of corporate assets, of $92,849 to his widow. The question is whether the payment so authorized was a "gift" excludible from the widow's gross income under § 102(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

STATEMENT

1. Norman F. Wiss died on September 15, 1954. He was then the vice-president and treasurer and a director of, and had been associated for thirty-five years with, J. Wiss & Sons Co. Mr. Wiss and his wife together owned 7.7% of the stock of the corporation, and the balance was owned primarily by other descendants of his grandfather, the company's founder. At the date of his death, Mr. Wiss was the highest paid officer of the corporation, receiving salary and bonuses totalling $80,000, the earned portion of which was subsequently paid to his estate and is not in issue. (R. 10a, 13a, 17a–18a.)

On September 23, 1954, the board of directors of the corporation (a brother, two cousins, and a nephew

of the decedent) adopted the following resolutions (R. 14a–15a):

> RESOLVED, that the following memorial be inscribed in the minutes of the directors of the company, and that a copy thereof be sent to Mildred S. Wiss, the surviving widow of Mr. Norman F. Wiss:
>
> The passing of a relative and associate and friend is always difficult to accept; and it is particularly so in the case of Norman F. Wiss with whom we were in close association for many years.
>
> Norman had been a director of the company for 35 years, and for 23 years he was vice president and treasurer, all of which offices he filled with distinction and with great benefit to the company.
>
> The sound financial condition of the company and its excellent reputation throughout the world are attributable in a large measure to the tireless energies, sound business judgment, high ideals and farsightedness of Norman. We owe a great deal to him, and we take this opportunity of expressing our gratitude for his valuable and loyal services and our deepest regret over his sudden and early death.
>
> * * * * *
>
> Whereas, Norman F. Wiss who was a director, vice president and treasurer of this company for many years died on September 15th, 1954 leaving his widow, Mildred S. Wiss, surviving; and
>
> Whereas, the directors of the company feel that it is proper and fitting that recognition be

made of the valuable and loyal services which he rendered to the company.

Now, therefore, be it Resolved that the company make the following payments to the said Mildred S. Wiss:

At the rate of $4583.33 per month (that being the salary of Norman F. Wiss at the time of his death, excluding bonuses) from September 15th, 1954 to December 31st, 1954.

7/24ths of the bonus which would have been paid to Mr. Wiss for the year 1954 (the 7/24ths being based on the period from September 15th, 1954 to December 31st, 1954; the remaining 17/24ths of the said bonus to be paid to the executors of the estate of the said Norman F. Wiss on account of compensation for services from January 1st, 1954 to the date of his death which occurred on September 15th, 1954).

$2750.67 per month for the two (2) year period beginning January 1st, 1955 and ending December 31st, 1956. The said payments to be made on the first day of each month beginning January 1st, 1955.

$5,000.00; payment as a death benefit under the Internal Revenue Code.

Pursuant to the resolution, the corporation made payments to Mrs. Wiss totalling $92,849—$21,000 in 1954, $38,841 in 1955, and $33,008 in 1956. The corporation deducted the payments on its income tax returns as business expenses. Mrs. Wiss treated them as "gifts" excludible from income under § 102(a) of the 1954 Code. The Commissioner held that the payments were not gifts and determined deficiencies for

1955 and 1956 accordingly.[2] In due course, Mrs. Wiss (who later became Mrs. Smith) petitioned the Tax Court for a redetermination of the deficiencies. (R. 13a, 17a, 21a–22a.)

2. On four occasions prior to Mr. Wiss' death, the corporation had made relatively small payments (varying from $850 to $1700, though in each case the employee had earned more than $10,000 a year) to the widows of non-executive employees; on other occasions, however, it had made no payments (R. 19a–20a). It had never previously made any payments to a widow or survivor of a deceased officer (R. 19a). Approximately five months after Mr. Wiss' death, the president of the corporation (Mr. Wiss' brother) died leaving no widow, and the board of directors authorized a $5,000 payment to his surviving children (R. 20a). A year later, the corporation adopted a pension and retirement plan which provided specifically for death benefits. After adoption of the plan, the board on two occasions authorized payments to widows in addition to those payable under the plan ($5,000 to the widow of an executive vice-president; $1200 to the widow of a salesman) (R. 20a–21a).

The only material testimony offered at the trial was that of Richard R. Wiss, the decedent's nephew, an officer (later president) of the corporation, and one of the directors who had voted for the resolution. Asked

[2] No deficiency was determined for 1954, so that year is not involved. Of the $21,000 received in 1954, $5,000 was admittedly excludible as an employee death benefit under § 101(b), but it does not appear why no deficiency was asserted as to the remaining $16,000 paid in that year.

what had occurred at the directors' meeting, he testified (R. 5a–6a):

> A. There was a general resolution adopted direct[ed] to Mrs. Mildred Wiss and made a part of the minutes in appreciation of Norman Wiss' many excellent years of past service, and after a considerable discussion there was a gift voted to Mrs. Mildred Wiss of approximately $80,000, spread over the next two years.
>
> Q. What was the motive of the Board in making this payment to Mrs. Wiss?
>
> A. The motive?
>
> Q. Yes.
>
> A. Primarily one of paying to the widow of a man who had been associated with the company in a primary capacity for many years, who had a substantial income to, say, give her an adjustment immediately following his death to a lowered financial basis of operation.
>
> Q. Did you consider at the time that Norman Wiss had been fully compensated for his services he had given the company?
>
> A. Very adequately, yes.
>
> * * * * *
>
> Q. Did you expect at that time, if you died, the company would make some payment to your widow?
>
> A. No, I didn't.

On cross-examination by government counsel, the witness testified (R. 6a–7a):

> A. On the same basis that we voted gifts to widows of other employees, we would have voted a gift as a transition to Mrs. Norman Wiss. I don't believe—I believe that the gift was proportionate to the fact that Norman Wiss

was considered an important employee to the company, consequently his salary was in the range that it was.

Q. So that the only reason you voted Mrs. Wiss a payment of this size was because of the value?

A. No, because of the size of his salary and a transition amount to tide her over as a widow, losing a substantial part of the income to which she had been accustomed.

Q. Now, Mr. Wiss, I ask you if you would have paid, as a director, from the funds of Wiss and Sons an amount, a payment of this type to Mrs. Norman Wiss if Mr. Norman Wiss had not been an employee of Wiss and Sons.

A. We certainly wouldn't if he hadn't been an employee.

Asked whether the amount of the payments was based on Mr. Wiss' salary, the witness replied (R. 7a):

A. It was the fact that his sizable income was such that without it, Mrs. Norman Wiss would have had an extremely hard time, as far as a transition, a transitory change of status of living.

He explained that no specific inquiry was made into Mrs. Wiss' income from other sources and that the action was based rather on an assumption that any widow suffering such a substantial reduction of income would have to make an adjustment in her mode of living (R. 8a). This colloquy followed (R. 8a–9a):

Q. Now, Mr. Wiss, keeping in mind your duties as a director, would you say that this payment was, as you stated in the minutes, in recognition of the services of Norman Wiss to the company?

A. I don't believe exactly that, no.

Q. Then, it was not in recognition of the services?

A. It was certainly in recognition of his position as an employee of the company, or else as directors we wouldn't have been making a gift to an outsider.

Q. In effect, you would not make a gift to an outsider?

A. We certainly wouldn't.

Q. You state this wasn't in recognition of his services?

A. It would be made in recognition of his salaried position as an officer of the company, yes.

Q. Isn't that saying the same thing, Mr. Wiss?

A. I can say as a non-employee, if he had not been an employee, and you rule out the element of service, entirely, we would not, I am sure, have voted to make a gift to Mrs. Norman Wiss. As an employee, his services were compensated by his salary at the time, and I can only repeat again that the gift was made in a transitory situation for a continuation of the salary that Mrs. Norman Wiss had been living on.

On re-direct examination, the witness was asked whether he had considered the several prior occasions on which widow-payments had been made (noted above) to be a "binding precedent on the Board." He replied (R. 9a):

A. There was no precedent upon the Board, no binding obligation on the part of the Board. There was no established practice. Each situation was handled on the basis of its own merits, and this is the situation that I per-

> sonally objected to when I became President of the company and had requested that a pension plan be put into effect, so that there could be a more equitable handling of any payments given to widows, rather than individual need in one case and no consideration in others where they may have been needed.

3. The Tax Court held that the payments were not gifts (R. 13a–23a). Although acknowledging that the directors "did have in mind to some extent the widow's diminished income," the court said (R. 22a):

> * * * we find it difficult to believe on the record as a whole that the payments to petitioner were based upon her needs, that they proceeded from a "detached and disinterested generosity," or that they were made "out of affection, respect, admiration, charity, or like impulses." Cf. *Commissioner* v. *Duberstein, supra*, 363 U.S. at p. 285. To the contrary, we conclude from the evidence as a whole that the dominant motive behind these payments was to give tangible recognition (by the way of additional compensation) to the highly valuable services rendered by the decedent over a long period of time.

The court of appeals held that the Tax Court's finding was not clearly erroneous and affirmed the judgment (Pet. 14–22).

ARGUMENT

As stated in the government's petitions for certiorari in *Commissioner* v. *Kuntz* and *Commissioner* v. *Olsen*, Nos. 394 and 395, this Term, we agree with the petitioners that the decision in this case, although in our view correct, is in direct conflict with the decisions of the Sixth and Eighth Circuits in those cases. We

also agree, as there stated, that the question is important. Accordingly, we join the petitioners in urging that the petition for certiorari be granted.

Respectfully submitted.

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